APPENDIX A

Judge Wilson's
Order Granting Summary Judgment
and
Memorandum Of Decision
On Motion For Summary Judgment
(A2-752)

COMMONWEALTH OF MASSACHUSETTS
The Trial Court
Probate and Family Court Department

HAMPSHIRE DIVISION **Docket No. 00P0296EP**

IN RE:	
ESTATE OF GREGORY GILLESPIE	ORDER

Upon the Motion for Summary Judgment, IT IS ORDERED THAT said Motion is hereby ALLOWED for the reasons stated in the Memorandum of Decision on Motion for Summary Judgment of even date.

IT IS FURTHER ORDERED THAT the Petition to Remove Fiduciary is hereby DISMISSED.

June 24, 2004
Date

s/_____
Honorable Geoffrey A. Wilson
Judge of Probate and Family Court

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The Trial Court
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HAMPSHIRE DIVISION **Docket No. 00P0296EP**

IN RE:	)
ESTATE OF GREGORY GILLESPIE	)

MEMORANDUM OF DECISION ON MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on the Motion for Summary Judgment filed by Peggy R. Gillespie with respect to Vincent Gillespie's Petition for her Removal as the Executrix of the Will of Gregory Gillespie.

Peggy R. Gillespie (hereinafter "the executrix") moves for summary judgment on the grounds that no genuine issue of material fact exists, and that she is entitled to judgment as a matter of law; that Vincent Gillespie lacks standing to seek removal of the executrix; that the executrix has not breached her fiduciary duties to the estate; and that there is no reason for the Court to remove the executrix sua sponte. Vincent Gillespie opposes the Motion on the ground that questions of material fact exist which preclude Summary Judgment.

I. BACKGROUND

A. Procedural History

Gregory Gillespie, a prominent artist, (hereinafter "decedent") died on April 27, 2000 and a Petition for Probate of his last will and a codicil was filed by Peggy R. Gillespie on May 24, 2000. The will which was submitted had been executed on November 17, 1988 and the codicil on February 25, 1992.

The decedent's son, Vincent Gillespie, was served in-hand with notice of the Petition and an attorney entered an appearance on his behalf on June 20, 2000. However, no affidavit was filed pursuant to Probate Court Rule 16, contesting the will and/or the codicil. On July 13 2000, therefore, the will and codicil were allowed, and Peggy R. Gillespie, the surviving spouse of the [**p. 2] decedent and his nominated executrix[1], was appointed executrix, all without objection.

On August 30, 2002, Vincent Gillespie filed a Petition and Order to Render Inventory-Account, and on September 3, 2002 the Court (Rainaud, J.) issued an Order to the executrix to render an Inventory and Account of her administration of the estate on or before October 4, 2002. The executrix filed her Inventory on October 4, 2002, together with a Motion seeking additional time in which to file the Account. The Court issued an Order that the executrix file her account on or before February 28, 2003 (Wilson, J.; as well as all subsequent orders set forth herein).

On October 25, 2002, Vincent Gillespie filed a Motion for Reconsideration of the Order extending the time for the executrix to file her account. The executrix filed an

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[1] Ms. Gillespie is the step-mother of the petitioner and his sister, Lydia Gillespie Chiaminto

Opposition pursuant to Standing Order 2-99. The Motion to Reconsider was denied on November 21, 2002.

On November 18, 2002, Vincent Gillespie (hereinafter "petitioner") filed the instant Petition for Removal of Fiduciary and Appointment of himself as "successor executor" (hereinafter "the petition"). As grounds for removal, the petitioner alleged that the executor "(1) has ignored or overridden several provisions of the will; (2) has taken underhanded, corrupt actions resulting in harm to other beneficiaries of the estate and creditors; (3) has bad character and is held in disdain by people who know her, and (4) has demonstrated a complete lack of impartiality and is unsuitable for the discharge of said trust."

On December 10, 2002, an Appearance on behalf of the executrix was entered by her counsel in opposition to the petition. On December 23, 2002, the petitioner filed his own Appearance pro se with respect to this petition, and also filed a Request for Pre-Trial Conference.[2] Subsequent to filing his pre-trial request, the petitioner sought by motion to expedite the assignment of the pre-trial conference date. This motion was denied, after hearing on February 12, 2003.

On January 30, 2003, the executrix filed her First and Final Account indicating that all distributions from the estate of Gregory Gillespie had been made as of December 31, 2002. The Court issued a citation on the Account on February 24, 2003, with a return day of April 2, 2003.

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[2] His appearance indicates that it was on behalf of himself and his sister, Lydia Gillespie Chiaminto, but a Board of Bar Overseers (BBO) number is not listed on the form. On June 11, 2003, Attorney Kenefick, present counsel for the petitioner, filed an Appearance on behalf of Vincent Gillespie and Lydia Gillespie Chiaminto.

Also on February 24, 2003, the petitioner filed a Motion for Preliminary Injunction with supporting memorandum and exhibits. On March 5, 2003, the executrix filed an affidavit in opposition to the Motion as well as a Motion to Strike and Impound. A hearing was held on [**p. 3] March 6, 2003 with respect to the parties' motions. At that time, the petitioner was given until March 10, 2003 to file further material in support of his position. On March 11, the Court denied the motion to strike and impound, and by separate Order denied the petitioner's motion for a preliminary injunction, based upon a finding that the petitioner lacked standing, and was unable to demonstrate a substantial likelihood of success on the merits in his petition to remove the executrix.

Following the denial of his motion for preliminary injunction, the petitioner sought reconsideration of the Court's ruling, and attempted, unsuccessfully, to be heard on several emergency ex parte motions in March 2003. Indeed, because of his repetitive and duplicative ex parte filings, the Court entered an Order, on March 26, 2003, prohibiting and restraining the petitioner from filing any additional "emergency" or ex parte motions of any kind. On April 2, 2003, his motion for reconsideration was denied.

On March 26, 2003, the petitioner filed an Appearance and an objection to the allowance of the account filed on January 30, 2003.

On April 17, 2003, the executrix filed a Motion to Substitute First and Final Account filed January 30, 2003 with an amended Account dated March 26, 2003. The executrix sought to file the amended Account in order to reflect certain additions to the inventory and expenses paid that were not reflected in the original Account. On April 23, 2003, an Order issued scheduling this Motion for hearing at

the time of the Pre-Trial Conference scheduled for May 14, 2003. The Pre-Trial Conference was subsequently rescheduled by a Notice of Reassignment to June 11, 2003, at which time the Court allowed the Motion to Substitute.

On May 5, 2003, the petitioner filed another objection to the account, along with a preliminary statement of objections and a Motion for Leave to file Statement of Objections to Account Late. On May 14, 2003, an Order issued, after hearing, directing him to file his written objections to the amended account on or before May 27, 2003. The petitioner filed an Affidavit in Support of Objection to First and Final Account on the date specified by the Court.

On May 20, 2003, the executrix filed the present Motion for Summary Judgment, along with a memorandum of law and her affidavit. This Motion was marked for hearing at the time of the Pre-Trial Conference on June 11, 2003. The petitioner filed his Opposition to Motion for Summary Judgment and his affidavit, as well as exhibits in support of his position, at that hearing.

On June 11, 2003, by agreement of the parties, the Court entered an Order that "the forty eight (48) paintings which Ms. Gillespie asserts were transferred to her by the decedent during his lifetime as gifts shall be examined by Mr. Carl Belz and designated by him as either major or non-major works, whereupon Lydia M. Gillespie and/or Vincent Gillespie shall be allowed to choose any of the paintings so designated as non-major works towards the five non-major pieces each is entitled to receive pursuant to the terms of the decedent's will." In view of this effort to find means by which to resolve the controversy between the parties, the Court continued the Pre- [**p. 4] Trial Conference to August 27, 2003.

However this effort was not successful and on August 27, 2003, after hearing, the Court issued a Pre-Trial Order specifying that all discovery requests be served so that responses were due on or before October 31, 2003, whereupon discovery would be closed. Subsequently a further pre-trial conference was scheduled for November 19, 2003.

On November 13, 2003, the petitioner filed a Memorandum in support of the Court's Acting *Sua Sponte* to Remove Executrix, and, on November 19, 2003, filed a Supplemental Memorandum in Opposition to Summary Judgment. On November 26, 2003, the executrix filed a Memorandum in Response to Vincent Gillespie's Supplemental Memorandum. That same day, the petitioner filed a Motion for Leave to File a Revised Supplemental Memorandum, together with the proposed Revised Supplemental Memorandum. On December 17, 2003, the Court allowed petitioner's Motion in this regard.

On December 12, 2003, the petitioner filed a Motion for Leave to File Limited Reply to Executrix's Memorandum in Response and a Reply to Executrix' Memorandum in Response. On December 15, 2003, the executrix filed her Opposition to petitioner's Motion for Leave to File Limited Reply. On December 17, 2003, the Court allowed petitioner's Motion for Leave to File Limited Reply.

For purposes of the present Motion for Summary Judgment, in addition to the decedent's will and codicil, the Court has reviewed and considered all of the following:

Pleadings

(1) Vincent Gillespie's Petition for Removal of Fiduciary, filed November 18, 2002;

(2) Executrix's Motion for Summary Judgment, filed May 20, 2003;
(3) Memorandum of Law in Support of Motion for Summary Judgment, filed May 20, 2003;
(4) Affidavit of Peggy R. Gillespie in Support of Motion for Summary Judgment, filed May 20 2003;
(5) Petitioner's Opposition to Summary Judgment, filed June 11, 2003;
(6) Affidavit of Vincent Gillespie in Opposition to Summary Judgment, filed June 11, 2003 and Letter dated March 5, 2001 attached as exhibit 1;
(7) Petitioner's Memorandum in Support of the Court's Acting *Sua Sponte* to Remove the Executrix, filed November 13, 2003;
(8) Petitioner's Supplemental Memorandum and the exhibits attached in support, filed November 19, 2003;
(9) Executrix's Memorandum in Response to Vincent Gillespie's Supplemental Memorandum in Opposition to Motion for Summary Judgment and the exhibits attached in support, filed November 26, 2003;

(10) Petitioner's Motion for Leave to File Revised Supplemental Memorandum in [**p. 5] Opposition to Motion for Summary Judgment, filed November 26 2003;
(11) Petitioner's Revised Supplemental Memorandum in Opposition to Motion for summary Judgment, filed November 26 2003;
(12) Petitioner's Motion for Leave to File limited Reply to Executrix's Memorandum in Response to Vincent Gillespie's Supplemental Memorandum in Opposition to Motion for Summary Judgment, filed December 17 2003;
(13) Petitioner's Reply to Executrix's Memorandum in Response to Vincent Gillespie's Supplemental

Memorandum in Opposition to Motion for Summary Judgment, filed December 12, 2003;

(14) Executrix's Opposition to Motion for Leave to File Limited Reply to Executrix's Memorandum in Response to Vincent Gillespie's Supplemental Memorandum in Opposition to Motion for Summary Judgment, filed December 15, 2003.

Depositions

(1) The March 4, 2003 deposition of Peggy Gillespie, executrix[3];
(2) The February 7, 2003 deposition of Robert Fishko, Forum Gallery NY, NY[4];
(3) The February 5, 2003 deposition of Nina Nielsen, Nielsen Gallery, Boston, MA[5];

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[3] The petitioner filed this deposition as "Exhibit C" in conjunction with his Opposition to Summary Judgment, but only provided the Court with pages 1,5, 9-34, 38-57, 59-60, 62, 92, 94, 107, 113, 127-130, 133, 135, 137, 141, 148, 154, 159, 163, 174, 181, 183-184, 186-187, 189. The transcript filed with the Court ends with page 189 but in as much as the last line is a question, it is clear that this is not the final page. For whatever reason, the petitioner has chosen not to provide the Court with a complete transcript.

[4] Once again, the petitioner filed this deposition as "Exhibit E" in connection with his Opposition, but only provided the Court with pages 1, 7,11, 13-14, 16, 18-19, 24, 38, 43. At the end of page 43 is an answer which is apparently continued on the following page.

[5] The petitioner filed this deposition as "Exhibit F" in conjunction with his Opposition, and provided the Court with pages 1, 6, 10, 13-14, 27, 30.

(4) The February 5, 2003 deposition of John Baker, Nielsen Gallery, Boston, MA[6];
(5) The October 22, 2003 deposition of Carl Belz, Franconia, NH along with exhibits 1 through 9 marked for identification

B. Factual History

[**p. 6] For purposes of the motion, the Court finds that the following material facts are not contested:

Under the decedent's will, as amended by the codicil, Vincent Gillespie and his sister, Lydia Gillespie, have the following limited interest:

> FIRST: I give and bequeath five (5) non-major pieces of my artwork to each of my children LYDIA M. GILLESPIE and VINCENT J. GILLESPIE who shall survive me by thirty (30) days.
>
> For purposes of these gifts, I consider my major works of art to be those of extraordinary quality or museum caliber quality. The identification of my major works of art shall be made by a consultant of recognized authority, uninterested in this determination, and chosen by my executrix. Recognized authorities whom might be consulted for this purpose include Mr. Hugh Davies, who is the director of the LaJolla Art Museum, and Mr. Carl Belz, who is the director of the Rose Art Museum of

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[6] The petitioner filed this deposition as "Exhibit G" in conjunction with his Opposition, and provided the Court with pages 1, 15, and 18.

> Brandeis University. My estate shall pay the expenses incurred in making this determination.
>
> Once my major works have been identified, the beneficiaries named above shall choose their bequests from among my non-major works, determining among themselves, if possible, who shall take which non-major works. If my said beneficiaries cannot make such determination among themselves, they shall choose one non-major work at a time, with the order of their choices determined by the drawing of lots conducted by my estate's attorney. The beneficiaries shall complete their choices no later than six (6) months after the date on which my major works are identified. Once my said beneficiaries have chosen their bequests from among my non-major works, these gifts shall include any insurance coverage thereon. (Will, p.1)
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> ....
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> FOURTH: I intentionally make no further provision in this, my will, for any child of mine or for any issue of any deceased children whether now or hereafter born. (Will, p.4)

The decedent left the remainder of his personal property, other than works of art, to his spouse, Peggy R. Gillespie, with some provision for his younger daughter Julianna M. Gillespie. (Will, p. 2). Further, as amended by the codicil, all of the artworks not bequeathed in article FIRST, as well as the residue and remainder of his estate, passed to Peggy Gillespie, Robin Freedenfeld, and Virginia Kaeser, as trustees of "The Gregory Gillespie Revocable Trust" (Will p.3 and Codicil, p.l).

The decedent left the following instructions in his will regarding the sale of his work as [**p. 7] follows:

> NINTH: If my executrix deems it advisable to sell any of my works of art such sales shall be made in consultation with the Trustee of the said GREGORY
> GILLESPIE REVOCABLE TRUST (and if my daughter JULIANNA MAY GILLESPIE should die without leaving issue who survive her by thirty (30) days during the administration of my estate then also in consultation with the Trustees of the Gregory Gillespie Foundation) so that an orderly program of sales may be established. During the course of my career and to this date I have employed Miss Bella Fishko as my sales agent and she has displayed my works of art at her gallery known as the "Forum Gallery" presently located at 1018 Madison Avenue, New York, New York. My executrix may or may not continue to use the services of Miss Fishko and the Forum Gallery. The program of sales shall be in accordance with the following guidelines:
>
> A. It is my primary intention that my works of art be sold to institutions or individuals that will permit the widest possible audience to view my works after their sale. Accordingly, my executrix shall endeavor to sell my works of art to museums, universities and other charitable organizations that will be able to place my works of art on public display. My executrix may also make sales to private collections, and in her discretion, my executrix may require certain commitments of public display as part of the negotiations for the sale of any of my works of art.

> B. It is also my intention that the sale of my works of art shall be made on a timely basis in light of public acceptance of, appreciation of, and demand for my works of art so as to maximize the sales price for each work of art sold. I understand that demand for my works of art may fluctuate, and, accordingly, I request that my executrix participate with the aforementioned Trustees to establish a flexible program of sales over a considerable period of time. (Will, p. 8). *[sic – this last sentence misquotes the will but it is printed as Judge Wilson wrote it.]*

The decedent named Peggy R. Gillespie as the executrix of his will. If she was unwilling, unable, or ceased to serve, Attorney William Hart was named as successor executor. (Will, p.7)

After the Petition for Probate of the decedent's will was filed on May 24, 2000, Vincent Gillespie's first counsel entered an Appearance on his and Lydia Gillespie's behalf on June 20, 2000. (Docket entry No. 8). That appearance stated that "No objections is made to the petition, but the petitioners wish an appearance to be filed on their behalf with regard to their beneficial interests in the will." (Docket entry No. 8). The will and codicil not having been contested, they were allowed on July 13, 2000, and Peggy R. Gillespie was appointed executrix. (Docket entry No.1).

In August of 2000, after being contacted by William Hart, an attorney for the executrix, Carl Belz agreed to perform the evaluation of the decedents artwork as mandated by article FIRST of the will. (See Deposition of Carl Belz, p. 22, line16 to p. 24, line 7 (hereinafter "Belz")). On August 11, 2000, Mr. Belz received copies of the will, the codicil, and a pictorial [**p. 8] inventory of the artwork in the decedent's studio. (Belz, 24:12 and deposition exhibit 1). He also received a copy of a memorandum by the executrix,

which listed forty-eight (48) works that were either not owned by the estate or were not to be sold right away. (Belz, 26:11-21, and exhibit 1).

On August 16, 2000, Mr. Belz received another pictorial inventory, this one of the decedent's artwork in the possession of the Forum Gallery in New York City, and he was asked by counsel for the executrix to include these works in his evaluation. (Belz, 25:12-22, 27:10-19, and exhibit 2). On August 22, 2000, Mr. Belz sent to Attorney Hart his initial classification of the decedent's works into the major or non-major categories. (Belz, 33:20-32:22 and exhibit 3).

This initial classification was followed, on August 30, 2000, by a list of nine artworks that Mr. Belz had reclassified as major from their prior non-major designation. (Belz, 48:2-18, and exhibit 4). After further reflection, Mr. Belz reclassified several additional pieces via a letter dated September 5, 2000. (Belz, 51:16-55:20 and exhibit 5). In this letter, he moved one work from major to non-major, and five other works from non-major to the major classification. (Id.) Finally, on September 26, 2000, after receiving photographic reproductions of five other pieces from the Nielsen Gallery in Boston, Mr. Belz also designated these artworks as non-major (Belz 64:16-66:9 and exhibit 7).

On March 5, 2001, pursuant to the six-month deadline established under the will, Vincent Gillespie selected the five non-major artworks that he wished to have pursuant to the term's of his father's will. He did so in writing to Attorney Hart stating: "I do so under protest. I am not abandoning my earlier claims." See Affidavit of Vincent Gillespie in Opposition to Summary Judgment, exhibit 1.

On February 7, 2003, the petitioner deposed Robert Fishko, owner of the Forum Gallery in New York City, which had represented the decedent from 1967 until his

death. (See Deposition of Robert Fishko, 7:10-17, 7:24-25 (hereinafter "RF")). Mr. Fishko testified that during the decedent's lifetime, there was an oral understanding regarding sales of his work. (RF, 11:10-24). The Forum Gallery held a memorial exhibition of the decedent's work and sold less than 10 paintings. (RF, 13:14- 14:4). He stated that the prices for the work in that exhibition were mutually agreed upon by the gallery and the estate. (RF, 16:8-25). Based on the decades long relationship between the decedent and the gallery, Mr. Fishko stated that the gallery was owed approximately $300,000 and that there was litigation with the estate to recover the debt. (RF, 24:6-25). Finally, Mr. Fishko testified regarding the appraisal of the estate and the fact that there was a disagreement regarding the appraisal. (RF, 43:5-25).

On March 4, 2003, the petitioner deposed the executrix, whereupon she testified at length as to the facts and circumstances surrounding the decedent's gifting of the forty-eight (48) artworks to herself and her daughter. (See Deposition of Peggy Gillespie, 9:22-60:14 (hereinafter "PG")). She stated that, with regard to the litigation with the Forum Gallery, she followed the advice of counsel on how to proceed. (PG, 107:3-11). She stated that she had discussions with Carl Belz regarding the work because of the quality of some of the photographs provided to him but that she did not attempt to influence his decisions. (PG, 127:13-130:24). She acknowledged [**p. 9] trading art for services to the estate, including legal work, but stated that this was due to a lack of available cash to pay for those same services. (PG, 181:11-22, 183:1-184:21). She also stated that all of the people who received art for services agreed to loan the work to any museum shows. (PG, 184:22-24). Regarding the appraisal of the estate by Robert Fishko, she explained her concern over using too low a figure and running afoul of the IRS to the detriment of the estate. (PG, 186:10-187:15).

Subsequent to the agreement of the parties of June 11, 2003, recounted in the procedural history supra, Mr. Carl Belz was again retained; this time to classify the forty-nine (49) paintings previously excluded from his initial evaluation in August 2000.[7] (Belz, 70:8-71:8 and exhibit 8). On July 24, 2003, Mr. Belz sent his list to counsel for the executrix, separating the previously excluded works into the requisite major/non-major categories. (Belz, 72:1-12 and exhibit 9).

The petitioner deposed Mr. Carl Belz on October 22, 2003. At that time, Mr Belz testified that, while he did move some artwork from the non-major to the major category after his initial assessment, this was due to his personal rethinking of the work and the legacy of the decedent (Belz, 48:2-50:23, 53:1-55:12, 61:14-62:23, 65:11-66:9, 81:8-85:14), and not due to any outside influence on the part of the executrix or other interested parties (Belz, 51:2-15, 58:14-21, 87:18-88:9). He also stated that he did not know which paintings the petitioner or his sister wanted when he was classifying the artwork. (Belz, 60:14-61:4). Mr. Belz testified that he understood his role as benefitting the estate and the legacy of the decedent (Belz, 41:14-42:3, 75:1-77:17, 86:5-87:17). He expressed his opinion that the executrix was doing a good job as demonstrated by her choosing the Salander O'Reilly gallery in New York City to show the decedent's artwork and obtaining a grant to document the artwork. (Belz, 42:8-47:2).

II. DISCUSSION

A. Summary Judgment Standard

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[7] By a letter dated July 17, 2003, counsel for the executrix indicated to Mr. Belz that there were actually forty seven (47) paintings which belonged to the executrix, plus an additional two (2) paintings that were somehow not included originally. See Carl Belz Deposition, exhibit 8.

Summary Judgment is appropriate "...if the pleadings, depositions, answers to interrogatories, and requests for admission...together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Mass. R. Civ. P. 56(c).

The moving party has the burden of proving that there is "no genuine issue of fact on every relevant issue raised by the pleadings." Kourouvacilis v. General Motors Corp. 410 Mass. 706, 711 (1991). The burden on the moving party may be met by showing that there is an absence of evidence to support the non-moving party's case, or by demonstrating that proof of an essential [**p. 10] element of the non-moving party is unlikely to be forthcoming at trial. Id. Furthermore where there is a complete failure of proof concerning an essential element of the non-moving party's case, all other facts are rendered immaterial. Id.

On the other hand, summary judgment must be denied when, viewing the evidence in the light most favorable to the non-moving party, there exist genuine issues of material fact or the moving party is not entitled to judgment as a matter of law. Golub v. Milpo, Inc., 402 Mass. 397, 400 (1988). If there is doubt as to the existence of a genuine issue of material fact that doubt must be resolved in favor of the non-moving party. Attorney General v. Bailey, 386 Mass 367, 371 (1982).

However, even though the Court must view the evidence in the light most favorable to the non-moving party, that party may not rest on his pleadings and mere assertions of disputed facts to defeat the motion for summary judgment. LaLande v. Eissner, 405 Mass. 207, 209 (1989).

B. The Petitioner Lacks Standing as an Individual to Seek Removal of the Executrix

Generally, individuals have standing to litigate matters only where they have an interest in the matter affecting their liberty, rights or property. Hogarth-swann v. Weed, 274 Mass. 125, 132 (1931); Razin v. Razin, 332 Mass. 754 (1955); Clymer v. Mayo, 393 Mass. 754, 763 (1985). Initially, a legatee has an interest in the competence and suitability of the executor, and therefore has standing to dispute the executor's appointment. Gay v. Richmond, 9 Mass. App. Ct. 334, 337 (1980). However, after receiving his legacy, the legatee loses standing by virtue of receive the interest due to him from the estate. Id. at 337 n.4.

The petitioner is a legatee under the will of Gregory Gillespie, which was allowed without contest, and with no objection having been raised by the petitioner as to the appointment of the executor. On March 5, 2001, the petitioner selected the five non-major artworks which were his specific bequest under the will. He did so "under protest" at the time due to his opinion that he did not have the opportunity to select from all of the artwork which should have been designated non-major.

The petitioner contends that Carl Belz, the recognized authority specifically named by the decedent as being among those qualified to categorize his artwork, was somehow unduly influenced by the executrix or otherwise made his designations without full knowledge of his role. However, the uncontroverted deposition testimony of Mr. Belz indicates that he did not know which artworks the petitioner or his sister desired, he did not make his determinations based on the executrix's wishes, and he considered his role to be benefitting the estate and legacy of the decedent.

Furthermore, by agreement of the parties on July 11, 2003, 49 artworks which were not included in the original designations by Mr. Belz were also submitted for categorization. This expanded the pool of available choices for the petitioner and his sister, despite the that each had already made their five selections, and represented an attempt by the executrix to address the [**p. 11] petitioner's claim that his original selection was "under protest" due to a limited universe of choices. However, despite seeking and agreeing to this expansion of choices, the petitioner has now refused to make any new selections. After his lack of standing has been raised by both the Court and the executrix, the petitioner's refusal to participate in this agreement cannot be used as a way to re-confer standing for him to continue to contest his legacy.

The petitioner argues that he continues to have standing to remove the executrix because I there are still paintings designated by Carl Belz as major works which are "unjustly inaccessible" to him. But this argument ignores the fundamental fact that the decedent specifically intended for the petitioner to receive only five non-major artworks and to not have the option of choosing any major artwork. The petitioner's real disagreement therefore appears to be with his father's decision to specifically limit his legacy under the will.

The executrix implemented the decedent's plan by contacting Mr. Belz and providing him with the documentation necessary for the evaluation of the artwork. Carl Belz then acted according to the wishes of the decedent by categorizing the artwork and thereby placing some artwork beyond the reach of the petitioner. This process was according to the will of the decedent which was allowed without objection from the petitioner. While it is true that the petitioner is a legatee under the will, the specific bequest which is his only interest would not be affected by the

removal of his step-mother as the executrix. Therefore he does not hold an interest affecting his rights or property in this matter which would confer standing upon him to seek her removal.

C. The Petitioner Lacks Standing on Behalf of the Public

A charitable gift is defined "as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government." Jackson v. Phillips, 14 Allen (96 Mass.) 539, 556 (1867). Unless otherwise provided for in a written instrument, a gift made for a public charitable purpose shall be deemed to have been made with a general intention to devote the property to public charitable purposes. G. L. c. 12, § 8K. If the gift is for a public charitable purpose, the attorney general has a duty to enforce the due application of funds given or appropriated to public charities within the commonwealth and prevent breaches of trust in the administration thereof. G. L. c.12 §8.

An individual, in limited circumstances, may assert standing on behalf of the public to seek enforcement of a public duty under the "public right doctrine." Tax Equity Alliance for Massachusetts v. Commisioner of Revenue, 423 Mass. 708, 714 (1996). The public right doctrine stands for "the principle that where a public officer owes a specific duty to the public to perform some act or service not due the government as such or to administer some law for the public benefit which he is refusing or failing to perform or administer any member of the public may compel by

mandamus the performance of the duty required by law." Kaplan v. Bowker, 333 [**p. 12] Mass. 455, 460 (1956).

Here, as the attorney general has declined the petitioner's request to intervene in this action[8], he now contends that he has standing "in the public interest" to seek removal of the executrix because of the charitable nature of the will of the decedent. To support his claim he selectively emphasizes portions of article NINTH of the will, rather than considering the entire provision. See article NINTH, supra at I(B).

It is not surprising that the Attorney General has apparently declined the petitioner's invitation to intervene to enforce the alleged "public charitable" intent of the decedent, as there is no charitable gift purporting to be for the public contained within the will. See Jackson v Phillips, 14 Allen (69 Mass.) 539, 556 (1867). The will is not for the indefinite benefit of a number of persons but rather for the benefit of the decedent's surviving spouse and their daughter. Thus, the attorney general owes no duty to the public to act where, as here, there is only a private purpose to the will.

In article NINTH, the decedent made clear the private, non-charitable intent of his estate plan in that (1) the executrix has the ultimate discretion whether to sell any artwork at all; (2) if she does find it advisable to sell artwork, she is to engage in an orderly program of sales in consultation with the trustees; (3) the executrix is free to engage the services of any gallery to effectuate the sales; (4) although the decedent's intent is for the widest possible audience for his artwork, the executrix has complete discretion whether to require commitments of public display

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[8] See Petitioner's Supplemental Memorandum, page 5, and Affidavit of Mary H. Patryn attached thereto.

for the sale of any artwork; (5) the decedent emphasized his desire that the maximum sales price for his work be realized by timing sales with demand; and (6) to maximize the sales price, the flexible program of sales is to occur over an extended period.

The Gregory Gillespie Revocable Trust is not before this Court on this petition to remove the executrix. However, the trust is obviously related to these proceedings in that the works of art are to ultimately become the property of the trust. The beneficiaries of the trust are the surviving spouse, executrix, and trustee Peggy Gillespie, and her daughter, Julianna Gillespie. The existence of this trust in the estate plan of the decedent indicates that the so-called "orderly program of sales" and the related efforts to maximize the sales price of the artwork are intended to fund the trust for their benefit. Public display is emphasized as the mechanism for maximizing the visibility of the artwork and thereby increasing the sales price of the work. Maximum public exposure, appreciation, and demand increases the benefit to Peggy and Julianna Gillespie under the trust because the artwork will bring greater sales prices. The over-riding intent of the will is to benefit these two individuals rather than the general public. Thus, there is no public interest or charitable intent here and the petitioner cannot assert standing under the public right doctrine.

[**p. 13] The petitioner urges the Court to consider the case of Kapiolani Park Preservation Society v. City and County of Honolulu, 751 P.2d 1022 (Hawaii 1988) for the proposition that members of the public have standing as beneficiaries to challenge the decisions of a public charitable trust. But this decision does not advance the petitioner's position, as this case involved a public park in the city of Honolulu that was originally created and maintained through a expressly public charitable trust with the city as trustee. Nothing of this nature is involved with the decedent's will in

the present instance. As already discussed, in this commonwealth, under the "public right doctrine", the general public could have standing to enforce a public charity. However, the decedent's will did not create a public charity for the benefit of the general public and the attorney general has no duty as a public officer to act to enforce the alleged charitable intent. If this were a situation where the decedent funded a museum, for example, for the benefit of the public, then perhaps this Hawaii case would offer some guidance.

D. There is Insufficient Evidence for the Court to Act Sua Sponte

The petitioner alleges in his petition for removal that the executrix "(1) has ignored or overridden several provisions of the will; (2) has taken underhanded, corrupt actions resulting in harm to other beneficiaries of the estate and creditors; (3) has bad character and is held in disdain by people who know her, and (4) has demonstrated a complete lack of impartiality and is unsuitable for the discharge of said trust." When the Court determined the petitioner lacked individual standing to seek removal of the executrix (See Order of March 11, 2003), he then asserted that under the circumstances the Court was justified, if not required, in removing the executrix *sua sponte*.

A Probate Court has the authority to remove an executrix if she is "unsuitable" for the office. G. L. c. 195, § 11. Unsuitability has been defined as "Past maladministration of a comparable trust, bad character, misconduct, neglect of duty, or physical or mental incapacity,... the existence of an interest in conflict with his duty, or a mental attitude toward his duty or toward some person interested in the estate that creates reasonable doubt whether the executor or administrator will act honorably, intelligently, efficiently, promptly, fairly and dispassionately in his trust... [or] ...

continuance in office will be likely to render the execution of the will or the administration of the estate difficult, inefficient or unduly protracted." Quincy Trust Co. v. Taylor, 317 Mass. 195, 196-197 (1944). The Court may act sua sponte to remove an executrix where a petitioner lacks standing and there is evidence establishing the "obvious unsuitability" of the executrix. Id.at 198; Clymer v. Mayo, 393 Mass. 754, 763 (1985); District Attorney for the Norfolk District v. Magraw, 417 Mass. 169, 171 (1994).

In Quincy Trust Co. v. Taylor, supra, without even reaching the issue of standing, the Supreme Judicial Court found the executrix to be unsuitable because she had done absolutely nothing to administer the terms of the will, had failed to keep any accounts, and had engaged in an unauthorized property conveyance to the detriment of the estate. Characterizing this conduct as "utter neglect", the Court found that the decision to remove her for her unsuitability was appropriate, notwithstanding the petitioner's lack of standing. Id.

[**p. 14] By contrast, in Clymer v. Mayo. supra at 163, the parents of the decedent could not maintain their petition for removal of the administrator because they lacked standing due to the existence of a valid pour-over trust for the residuary of the estate. In considering whether *sua sponte* removal was appropriate, in that instance, the Court distinguished the parents' reliance on Quincy Trust Co. by virtue of the fact that they had produced no evidence to support their charges of misconduct, nor did their briefs and arguments allege facts justifying the court to act on its own. Id. Thus, the dismissal of the petition for removal was affirmed. Id.

More recently, in District Attorney for the Norfolk District v. Magraw, supra, a district attorney petitioned for

removal of an executor who was both the husband of the decedent and a suspect in her murder. Id. at 174. In the pending criminal investigation, the District Attorney sought information from the decedent's attorney and psychotherapist but the executor refused to waive the attorney-client and psychotherapist-patient privileges. Id. The Court concluded that this constituted an "obvious conflict of interest" in that the executor, as a suspect in his wife's death, had an interest in keeping from law enforcement officials any information which had the possibility of inculpating him. Id. Turning to the definition of unsuitability set forth in Quincy Trust Co., the Court found that the existence of these conflicting interests "certainly "creates reasonable doubt" that he honestly, fairly, and dispassionately could execute his responsibilities as executor of his wife's estate." Id. Therefore, removal of the executor on these facts was required. Id.

Here, the evidence presented by the petitioner which he claims demonstrates the unsuitability of the executrix - much of which has already been discussed above - falls far short of the proof which would justify *sua sponte* removal by this Court. He alleges that the executrix (1) has a conflict of interest with her fiduciary duties in that she believes the purpose of the estate plan is to provide her with income instead of "propagat[ing] a widespread appreciation for [the decedent's art]"(Opposition to Summary Judgment, p. 12); (2) has claimed 48 paintings as her own and thus has a conflict of interest (Opposition, p. 13); (3) has a "substantial animus" against the petitioner and his sister which is demonstrated by her narrowing the pool of choices of the decedent's work (Opposition, p. 13); (4) has failed to execute the terms of the decedent's will in that she has not promoted his work and has traded art for services (Opposition, p. 13); (5) has not informed the Forum and Nielsen Galleries of the terms of the will (Opposition, p. 14); (6) has only placed two paintings in museums (Opposition, p. 14); (7) has failed to

conduct a "program of sales" pursuant to the terms of the will. (Opposition, p. 14); and (8) has destroyed the estate's relationship with the Forum Gallery due to litigation over the debt owed by the estate (Opposition, p.15).

However, there is actually substantial evidence of the suitability of the executrix. She was chosen by the decedent and duly appointed by the Court. See Grossman v. Grossman, 343 Mass. 565, 568 (1962). Unlike the executrix in Quincy Trust Co., she has not neglected her duty, as demonstrated by her timely probating of the will, and filing two inventories and accounts. She is also implementing the terms of the decedent's will and, in particular, the so-called "program of sales." She arranged for a show of the artwork at the Salander O'Reilly Gallery and a December 2003 exhibit at the Fogg Art Musuem at Harvard University. (Memorandum in Response to [**p. 15] Supplemental Memorandum in Opposition, exhibit A and B). In addition, the Nielsen Gallery in Boston showed the decedent's artwork, timed to coincide with the Fogg Art Museum show. (Memorandum in Response, exhibit A). This arrangement comports with the wishes of the decedent to sell work when there is maximum public exposure and demand.

Additionally, while the petitioner alleges that the exclusion from the estate of 48 paintings by the executrix constitutes some form of conflict of interest, he offers no additional proof or authority for his position. His allegation of "substantial animus" towards him and his sister based on the executrix's "narrowing" of the pool of choices of works again fails to recognize that the decedent established the mechanics of the designation of their specific limited legacy, and that Carl Belz conducted the categorizing of the work as laid out in the will. The executrix implemented the mechanism by which the legacy was to be identified. Evidence of her "animus" is lacking, particularly in light of the fact that she entered into an agreement with the petitioner

to include previously excluded work, even though she claimed that it was not the property of the estate.

The petitioner also alleges unsuitability due to the executrix's failure to inform the galleries of the terms of the will as well as destroying the pre-existing relationship with the Forum Gallery. The decedent's will contains no requirement that the galleries be provided with the terms of the will. Likewise, the decedent did not require the executrix to continue the relationship with the Forum Gallery. In fact, in article NINTH, the decedent specifically states: "My executrix may or may not continue to use the services of Miss Fishko and the Forum Gallery." There is also no requirement in the will that works be placed in museums. As discussed above, the executrix has sole discretion whether to sell any work at all. If she does choose to sell, the will gives her discretion as to whether to require commitments of public display. There is no requirement in the will that a certain number of works be donated or sold to any museum.

Finally, unlike District Attorney for the Norfolk District, the executrix's duty as a fiduciary and her personal interests are not in conflict under these circumstances. The clear intent of the estate plan is to fund the trust and provide income to the beneficiaries. This intent is to be realized by maximizing exposure of the decedent's work and thereby maximizing the sales prices. As both fiduciary and beneficiary of the trust, the interests of the executrix are in harmony. As fiduciary, she is charged with faithfully executing the will of the decedent to maximize the exposure and the price for his work. As beneficiary, her personal interest is for the work to receive maximum exposure so that the trust will receive as much income as possible from the sales of the work.

As a result, even when viewed in the light most favorable to the petitioner, this evidence does not justify *sua sponte* removal. No valid reason has been given to doubt that the executrix has, and will, continue to "act honorably, intelligently, efficiently, promptly, fairly and dispassionately in [her] trust". Quincy Trust Co. v. Taylor, supra at 197. Nor has the administration of the estate been rendered more difficult or unduly protracted by the executrix's acts. Id. To the contrary, the difficulty and delay have been due to the acts of the petitioner.

[**p. 16] Ultimately, the will gives the executrix a considerable degree of latitude in performing her fiduciary duties, even when one considers the guidelines for selling the works of art which the petitioner invokes selectively to second-guess her decisions. The decedent specifically named his wife to be the person to carry out his wishes by administering his estate. The fact that the petitioner emphatically disagrees with her decisions is not enough to rise to the level of unsuitably justifying *sua sponte* action by this Court.

III. CONCLUSION

For the foregoing reasons, there being no genuine issue as to any material fact and an absence of evidence to support the essential elements of the petitioner's case, the executrix, Peggy Gillespie is entitled to judgment as a matter of law. Accordingly by separate order, the Motion for Summary Judgment shall be allowed and the Petition to Remove Fiduciary dismissed.

June 24, 2004
Date

s/_____
Honorable Geoffrey A. Wilson
Judge of Probate and Family Court

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APPENDIX B

Memorandum and Order of the Massachusetts Appeals Court

Commonwealth of Massachusetts
Appeals Court for the Commonwealth
At Boston,

In the case no. 05-P-1444

VINCENT GILLESPIE

vs.

PEGGY R. GILLESPIE, executrix.

Pending in the Probate & Family
Court for the County of Hampshire

Ordered, that the following entry be made in the docket:

Judgment affirmed.
Orders dated June 30,
2005, and August 17,
2005, denying post judgment
motions affirmed.

By the Court,

s/_____, Clerk

Date August 14, 2006.

NOTE:
The original of the within rescript
will issue in due course, pursuant
to M.R.A.P.23

APPEALS COURT

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

05-P-1444

VINCENT GILLESPIE

vs.

PEGGY R. GILLESPIE, executrix.[9]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff, Vincent Gillespie (Vincent), appeals the summary judgment granted by a judge of the Probate and Family Court in favor of the defendant, Peggy R. Gillespie (Peggy or executrix). Vincent claims that the judge erred by concluding that he lacked standing to sue for the removal of the executrix and that the executrix was not competent and should have been removed from that position by the court, sua sponte. We affirm.

On appeal, we review the grant of a motion for summary judgment to evaluate whether, when viewing the evidence in the light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as matter of law. See Mass.R.Civ.P. 56(c), 365 Mass. 824 (1974); Gray v. Giroux, 49 Mass. App. Ct. 436, 438 (2000). When reviewing a summary judgment granted in favor of the defendant, the appellate court must assume the truth of all facts the plaintiff properly presented to the trial court and the plaintiff is

[9] Of the estate of Gregory Gillespie.

entitled to any favorable inferences that may be [**p. 2] drawn from these materials. Harrison v. Boston Fin. Data Servs. Inc., 37 Mass. App. Ct. 133, 136 (1994). However, a plaintiff's conclusory statements, general denials, and factual allegations, which are not based on personal knowledge, are insufficient to overturn the granting of a motion for summary judgment. Cullen Enterprises, Inc. v. Massachusetts Property Ins. Underwriting Assn., 399 Mass. 886, 890 (1987). In addition, we may affirm summary judgment on any grounds supporting the trial judge's ruling. Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117, 120 (1991).

Facts. Gregory Gillespie (decedent), a prominent artist, died on April 26, 2000. His wife (Peggy), their daughter (Julianna), and two adult children from a previous marriage (Vincent and Lydia), survived him. In a will which was executed on November 17, 1988, the decedent named Peggy as the executrix. The will was allowed for probate without objection.

In the first article of the will, the decedent provided that each of his two adult children, Vincent and Lydia, would be able to select five of his nonmajor artworks of their choosing. Carl Belz, an art expert specified in the will, divided the decedent's artwork into major and nonmajor categories. At the request of the executrix, Belz reconsidered his initial classification and reclassified an additional fourteen pieces into the major category, thereby further limiting Vincent's selection. The [**p. 3] executrix further limited Vincent's selection of artwork by claiming that an additional forty-eight paintings were given to her by the decedent during his lifetime as gifts. Vincent selected his five pieces, stating that he was doing so "under protest."

The remainder of the paintings were to pass to the executrix, as trustee of a separate trust. The decedent further directed in his will that works of art sold should be sold so as to permit the widest possible audience and that the executrix should try to sell his works of art to museums, universities,

and other charitable organizations that would be able to put his work on public display.

On November 18, 2002, Vincent filed a petition for removal of Peggy as the executrix of his father's will on the grounds that she had ignored several provisions of the will, taken corrupt actions to harm other beneficiaries, possessed poor character, and demonstrated lack of impartiality. On June 24, 2004, a judge of the Probate and Family Court granted the defendant's motion for summary judgment.

Standing. Vincent argues that the judge erred in concluding as matter of law that he did not have standing to petition for the removal of Peggy as executrix. The judge concluded that Vincent ultimately lacked standing to challenge the competency of the executrix when his legacy became satisfied. We agree. [**p. 4] Because a legatee has an interest in the competence and suitability of the executor, legatees have standing to challenge the executor's appointment and to petition for removal. However, after receiving the legacy, the legatee no longer has standing since his legacy has already been fulfilled. See Gay v. Richmond, 9 Mass. App. Ct. 334, 337 n.4 (1980). Thus, though Vincent initially had standing to challenge the appointment of Peggy as executrix, he lost his standing to do so once his legacy had been fulfilled.

Vincent argues that his legacy was not actually fulfilled because he was not permitted a full selection of nonmajor works to choose from. We disagree. When challenged about the forty-eight paintings she claimed as gifts from the decedent during his lifetime, the executrix made those paintings available to Vincent and Lydia for their selection. Vincent declined to re-select his paintings. He was thus given a full opportunity to chose from among those paintings he initially claimed had been withheld from him. In addition, Belz's undisputed testimony indicates that his reclassification of fourteen paintings into major status was not the result of the executrix's improper influence. There is thus no genuine issue of material fact that Vincent's legacy

had been fulfilled and as such he lacked standing as a legatee to petition the court for the removal of the executrix. He could not maintain his "protest" under these [**p. 5] circumstances and his failure to make a choice from the expanded number of paintings amounted to a satisfaction of his legacy.

The probate judge also correctly concluded that Vincent lacked standing on behalf of the public to petition for the removal of the executrix. Vincent claims that due to the charitable nature of the decedent's will and the Attorney General's failure to intervene, he has standing on behalf of the public to petition for the removal of the executrix. Cf. Tax Equity Alliance for Mass. v. Commissioner of Rev., 423 Mass. 708, 714-715 (1996) (in limited circumstances, an individual may assert standing on behalf of the public to enforce a public duty). Although there is language in the decedent's will indicating that he sought the widest possible audience for his work, the will as a whole is clearly designed to benefit Peggy and Julianna. In the will, the executrix has discretion as to whether to sell any artwork at all and the executrix has discretion to require commitments of public display as part of the sale of any artwork. The decedent indicates that sales of artwork should be timed so as to take maximum advantage of demand. Furthermore, the works of art named in the will are to become the property of the Gregory Gillespie Revocable Trust, of which Peggy and Julianna are the beneficiaries, and the proceeds from the sale of artwork go to the trust. Therefore, the judge did not err in concluding that the primary intent of the will was [**p. 6] to benefit Peggy and Julianna rather than the general public. See Weaver v. Wood, 425 Mass. 270, 275 (1997) (will is charitable in nature if designed to benefit not one or two individuals but devoted to purposes that are beneficial to a broader community). As such, the public has no interest in the will and Vincent cannot assert standing on behalf of the public to petition for the removal of the executrix.

Qualification of executrix. There was also no genuine issue of material fact as to the executrix's competency. Where a petitioner lacks standing, a court may act sua sponte to remove an executor when there is sufficient evidence establishing the obvious unsuitability of the executor. See Quincy Trust Co. v. Taylor, 317 Mass. 195, 196 (1944). Vincent did not present sufficient evidence to support a sua sponte removal of the executrix. The cases where sua sponte action is appropriate involve severe misconduct on the part of the executor. See Id. at 196-197 (executrix may be removed where she failed to administer the terms of the will and made an unauthorized property conveyance to the detriment of the estate); Clymer v. Mayo, 393 Mass. 754, 763 (1985). In the present case, Vincent claims that the executrix should have been removed because she had a conflict of interest, had an animus against two other beneficiaries, and had not met certain provisions of the will. However, these allegations were not supported by evidence in the [**p. 7] record. Any theoretical conflict of interest due to the status of the executrix as a person taking under the will was not borne out by the evidence.

3. Postjudgment motions. Finally, Vincent argues that the judge erred in denying his motion for relief from judgment pursuant to Mass.R.Civ.P. 60(b)(2) and (6), 365 Mass. 828 (1974), or motion for reconsideration. Such motions are reviewed on appeal under an abuse of discretion standard. See Cullen Enterprises, Inc. v. Massachusetts Property Ins. Underwriting Assn., 399 Mass. at 894; Raheman v. Raheman, 59 Mass. App. Ct. 915, 916 (2003). In his rule 60(b) motion, Vincent did not present sufficient new evidence to warrant the granting of his motion for relief from judgment. See Wojicki v. Caragher, 447 Mass. 200, 213-215 (2006) (newly discovered evidence insufficient to warrant new trial where the evidence was previously discoverable and not so important as to make a different outcome likely); Dray v. Vardenski, 4 Mass. App. Ct. 861, 862 (1976). The judge did not abuse his discretion in

denying Vincent's motion for relief from judgment. See Murphy v. Administrator of [**p. 8] the Div. of Personnel Admin., 377 Mass. 217, 228 (1979).

Judgment affirmed.

Orders dated June 30, 2005, and August 17, 2005, denying post judgment motions affirmed.

By the Court (Kantrowitz, Berry & Doerfer, JJ.),

s/_____

Clerk

Entered: August 14, 2006.

APPENDIX C

The Massachusetts Supreme Judicial Court's Notice Of Denial of Application For Further Appellate Review

JOYCE CORONA

From: SJCCommClerk@sjc.state.ma.us
To: "Thomas A. Kenefick III, Esquire" tak3@att.net
Sent: Thursday, November 02, 2006 4:00 PM
Subject: FAR-15719 – Notice: FAR denied

Supreme Judicial Court for the Commonwealth of Massachusetts
John Adams Courthouse
One Pemberton Square, Suite 1400, Boston, Massachusetts 02108-724
Telephone 617-557-1020, Fax 617-557-1145

RE: Docket No. FAR-15719

PEGGY R. GILLESPIE
vs.
VINCENT GILLESPIE

Hampshire Probate & Fam No. 00P0296EP
A.C. No. 2005-P-1444

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that on 11/02/06, the above-captioned Application for Further Appellate Review was denied.

Susan Mellen, Clerk

Dated: November 2, 2006

To: David R. Kaplan, Esquire
Thomas A. Kenefick, III, Esquire

This e-mail notice is being sent to you as part of a pilot program being conducted by the SJC Full Court Clerk's office. Under the program, notices will be sent by e-mail to those whose e-mail addresses have been provided to the Clerk's office. During the pilot program, a copy of the notice will also be sent to you by regular mail. If you have any comments about this e-mail notification, please let us know. If you would prefer not to receive such e-mail notices, please notify us at the above e-mail address. Thank you.

APPENDIX D

Judge Wilson's Order Granting a Temporary Restraining Order which prevented Peggy from selling any paintings during part of a show of Greg's work

(A1-184)

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
PROBATE AND FAMILY DEPARTMENT

HAMPSHIRE DIVISION **Docket No.** 00P0296EP

In the Matter of)
the Estate of:)
) ORDER
)
GREGORY GILLESPIE)

After hearing on February 26, 2003 at which Vincent Gillespie was present and unrepresented as well as David R. Kaplan, Esquire, counsel of record for the executrix, Peggy Gillespie, IT IS ORDERED THAT:

1. No deposition of Julianna Gillespie shall take place prior to counsel being in place for Julianna, as she is a minor.

2. Peggy Gillespie shall make herself available to be deposed no later than March 4, 2003.

3. While the show presently scheduled to open in New York City on or about March 4, 2003 may proceed as planned, the Estate of Gregory Gillespie is restrained from transferring any assets of the estate; and/or from entering into any binding contractual obligations in that regard until further order of this Court.

4. The Motion of Vincent Gillespie for Preliminary Injunction filed February 24, 2003 will be heard on **THURSDAY, MARCH 6, 2003 at 2:00 P.M.**

February 26, 2003
Date

s/_____
Honorable Geoffrey A. Wilson
Judge of Probate and Family Court

APPENDIX E

The Will and Codicil
(A1-17)

I, GREGORY GILLESPIE, of Belchertown, Hampshire County, Massachusetts, declare this instrument to be my last will and testament, hereby revoking all previous wills and codicils made by me.

FIRST: I give and bequeath five (5) non-major pieces of my artwork to each of my children LYDIA M. GILLESPIE and VINCENT J. GILLESPIE who shall survive me by thirty (30) days. In addition, I give and bequeath one (1) non-major piece of my artwork to my former wife, FRANCES C. GILLESPIE, if she survives me by thirty (30) days.

For purposes of these gifts, I consider my major works of art to be those of extraordinary quality or museum caliber quality. The identification of my major works of art shall be made by a consultant of recognized authority, uninterested in this determination, and chosen by my executrix. Recognized authorities whom might be consulted for this purpose include Mr. Hugh Davies, who is the director of the LaJolla Art Museum, and Mr. Carl Beltz, who is the director of the Rose Art Museum of Brandeis University. My estate shall pay the expenses incurred in making this determination.

Once my major works have been identified, the beneficiaries named above shall choose their bequests from among my non-major works, determining among themselves, if possible, who shall take which non-major works. If my said beneficiaries cannot make such determination among [**p. 2] themselves, they shall choose one non-major work at a time, with the order of their choices determined by the drawing of lots conducted by my estate's attorney with a separate order so determined for the second, third, fourth and fifth works of art to be chosen by my said children. The beneficiaries shall complete their choices no later than six (6) months after the date on which my major works are identified. Once my said beneficiaries have chosen their bequests from among my non-major works,

these gifts shall include any insurance providing coverage thereon.

SECOND: I give the remainder of my tangible personal property other than my works of art that pass under Article THIRD below as part of my residuary estate, together with any insurance providing coverage thereon, to my wife, PEGGY ROGGENBUCK GILLESPIE, if she survives me by thirty (30) days. If my said wife does not so survive me, I authorize my executor to sell said tangible personal property and to add the proceeds of such sale to the residue of my estate, provided, however that if my daughter JULIANNA MAY GILLESPIE, whether or not she is legally *[the words "G.G. KS KSH" have been typed in at the left margin here]* adopted by me at my death, wishes to keep any of said tangible personal property, or if she is a minor, if my executor deems it advisable to distribute any of said tangible personal property to her, I authorize my executor to distribute to her so much of said tangible personal property together with any insurance providing coverage thereon as my executor deems advisable. The decision of my executor as to the items to be given to my said daughter shall be final.

[**p. 3] THIRD: Any and all works of art created by me and owned by me at my death and not bequeathed in Article FIRST above shall pass as a part of my residuary estate under this Article THIRD of my will. For purpose of this will, my "works of art" and "artwork" shall include, but shall not be limited to, my paintings, sketches, drawings, sculpture, etchings, etching plates, manuscripts, journals and other writings together with all economic rights associated therewith.

All of the rest, residue and remainder of my estate, real and personal, of every nature and description and wherever located, including all of my works of art not bequeathed in Article FIRST above, not intending hereby to exercise any power of appointment that I may have at the time of my death, which I hereby expressly

decline to exercise, I give, devise and bequeath to my said wife, PEGGY ROGGENBUCK GILLESPIE, ROBIN FREEDENFELD and PHYLLIS KORNFELD in their capacity as Trustee under a certain instrument of revocable trust executed by me this day just prior to the execution of this will and entitled "GREGORY GILLESPIE REVOCABLE TRUST" or, if said Trustee is not then serving as such, to the person, persons and entity then so serving to be added to the property, if any, then held in trust by said Trustee and to be held and administered in accordance with the terms of trust stated in said instrument of revocable trust as from time to time amended. If for any reason a court of competent jurisdiction shall declare this testamentary transfer to the Trustee of said revocable trust to be invalid, I declare that the [**p. 4] said property shall be held, managed, invested and reinvested by said Trustee as a trust fund in exactly the same manner described in said instrument of revocable trust giving effect to all amendments of said trust if it shall be legal to do so, but in any event giving effect to the provisions of said instrument as they now exist and by the same Trustee, and for that purpose I do hereby incorporate the said instrument of revocable trust by reference into this, my will.

FOURTH: I intentionally make no further provision in this, my will, for any child of mine or for any issue of any deceased children whether now or hereafter born.

FIFTH: I direct my executrix to pay out of that part of my residuary estate allocated to the residuary trust under said GREGORY GILLESPIE REVOCABLE TRUST all death, succession, transfer, estate and inheritance taxes payable by reason of my death on account of any property whether passing under this will or not, but not including any taxes imposed by reason of my death by Chapter 13 of the Internal Revenue Code of 1986, as amended. I authorize my executrix to settle and compromise, as soon as convenient after my death, any of such taxes. If

said portion of my residuary estate allocated to said residuary trust is insufficient to fully pay said taxes, no property included in the marital deduction in my estate for Federal and state Estate Tax purposes shall be used to pay or contribute to the payment of any such taxes. If there shall be included in my estate for tax purposes any property other than in [**p. 5] said GREGORY GILLESPIE REVOCABLE TRUST over which I have a power of appointment, whether or not exercised or released by me, my executrix shall seek to recover from the recipient of said property at least such portion of any increase in taxes on account of the inclusion of such property as the law may provide. Notwithstanding the foregoing, I direct that United States Treasury bonds redeemable at par plus accrued interest in payment of the Federal Estate Tax held in said trust at the time of my death that become assets of my estate may be used for payment of the Federal Estate Tax payable on account of my death to the extent that the amount of such bonds so redeemable in my residuary estate prior to the addition of any such bonds from said trust shall be inadequate to pay the full amount of such taxes. Expense deductions of my estate may be taken in calculating the Federal and state Estate Tax or the Federal Income Taxes of my estate at the discretion of my executrix; elections by my executrix with regard to such deductions, shall be binding on all persons interested hereunder and shall not result in adjustment of income or principal accounts with respect to my estate. My executrix may join with my wife in filing joint gift and income tax returns without actual gift from or receipt of income by my estate, and without making compensating adjustments, and may consent to treating for Federal Gift Tax purposes half of any gift made by my said wife as made by me, despite any resulting additional liability to my estate.

[**p. 6] I authorize my executrix to make valuation elections for purposes of any state estate or inheritance taxes and the Federal Estate Tax, and in the sole discretion of such executrix, to determine

whether to elect to qualify any portion of Trust B under Clause VB of said GREGORY GILLESPIE REVOCABLE TRUST or any other property in my gross estate for Federal Estate Tax purposes or state estate tax purposes as qualified terminable interest property under Section 2056(b)(7) of the Internal Revenue Code of 1986, as amended, or similar provisions of any state estate tax law. Such determination as to the election to qualify any portion of Trust B or any other property as qualified terminable interest property shall be conclusive and binding upon all affected persons, whether or not in being, and my executrix shall not be liable for any such determination made in good faith. While I generally expect my executrix to seek to minimize the Federal Estate Tax payable with respect to my estate, I also expect that consideration will be given to the Federal Estate Tax payable with respect to the estate of my wife upon her death. I further authorize my executrix to make such other elections for tax purposes as such executrix shall deem proper, without regard to the tax effect of any such election on the recipient of any property.

SIXTH: I request that, to the extent permitted by law, the representation of the interests of minors and persons unborn and unascertainable who may be interested under [**p. 7] this will or under said GREGORY GILLESPIE REVOCABLE TRUST shall be dispensed with.

SEVENTH: I appoint my wife, PEGGY ROGGENBUCK GILLESPIE, as guardian of the person and property of my minor children. If my said wife shall not survive me or shall be unable or shall cease to serve as such guardian, I hereby appoint PHYLLIS KORNFELD, of Hatfield, Massachusetts, as guardian of the person and property of any such children. If the said PHYLLIS KORNFELD shall not survive me or shall be unable or shall cease to serve as such guardian, I hereby appoint ROBERT E. RECHTSCHAFFEN and his wife, VIRGINIA R. ACKERMAN, of Belchertown, Massachusetts, or the survivor of them or such of them as is willing and able to so

serve, as guardian of the person and property of any such children.

EIGHTH: I hereby name my wife, PEGGY ROGGENBUCK GILLESPIE, to be executrix of this, my will, or if she is unwilling or unable or ceases to serve as such, I name WILLIAM E. HART, of Amherst, Massachusetts, to act as executor. I request that my nominee for executrix be appointed as temporary executrix until appointment as executrix hereunder or the appointment of any administrator or administrators with this will annexed.

No bond shall be required of my executrix, whether or not temporary, or of any guardian hereunder, or, if a bond is required by law, no surety shall be required on such bond.

[**p. 8] I hereby authorize my executrix, without license of any court, to retain in and as a part of my estate, for so long as may be deemed advisable, any of the property, real or personal, at any time comprising part of my estate and to sell, mortgage, pledge, manage, invest and reinvest any or all of such property at any time prior to the allowance of such fiduciary's final account.

NINTH: If my executrix deems it advisable to sell any of my works of art such sales shall be made in consultation with the Trustee of the said GREGORY GILLESPIE REVOCABLE TRUST (and if my daughter JULIANNA MAY GILLESPIE should die without leaving issue who survive her by thirty (30) days during the administration of my estate then also in consultation with the Trustees of the Gregory Gillespie Foundation) so that an orderly program of sales may be established. During the course of my career and to this date I have employed Miss Bella Fishko as my sales agent, and she has displayed my works of art at her gallery known as the "Forum Gallery," presently located at 1018 Madison Avenue, New York, New York. My executrix may or may not continue to use the services of Miss Fishko and the Forum Gallery. The program of sales shall be in accordance with the following guidelines:

A. It is my primary intention that my works of art be sold to institutions or individuals that will permit the widest possible audience to view my works after their sale. Accordingly, my executrix shall endeavor to sell my works [**p. 9] of art to museums, universities and other charitable organizations that will be able to place my works of art on public display. My executrix may also make sales to private collections, and, in her discretion, my executrix may require certain commitments of public display as part of the negotiations for the sale of any of my works of art.

B. It is also my intention that the sale of my works of art shall be made on a timely basis in light of public acceptance of, appreciation of, and demand for my works of art so as to maximize the sales price for each work of art sold. I understand that demand for my works of art may fluctuate, and, accordingly, I request that my executrix participate with the aforementioned Trustees to establish a flexible program of sales, recognizing that there may be a need to spread sales over a considerable period of time.

TENTH: All references herein to Federal Estate Tax, Federal Income Tax and Federal Gift Tax are to the Estate, Income and Gift Taxes, respectively, under the Internal Revenue Code of 1986, as amended and in force at the time of my death. Where necessary for the proper meaning to be given to the terms used herein, words denoting one gender include the other genders, the singular includes the plural and the plural includes the singular. As used herein the word "issue" shall not include illegitimate children in any generation or their issue, but an adopted child in any generation and his issue shall be treated as the natural child and issue of the adopting parent. References [**p. 10] herein to "executrix" or "executor" shall denote and include any administrator with this will annexed.

IN WITNESS WHEREOF, I have hereunto set my hand on this Nov 17, 1988.

s/Gregory Gillespie
GREGORY GILLESPIE

Signed, published and declared by the Testator, GREGORY GILLESPIE, as and for his last will and testament, in the presence of us, who in his presence, at his request and in the presence of each other, have hereto subscribed our names as witnesses, and it is the opinion of each of us that said Testator is of full age and of sound mind.

s/Karen Swenson — 165 Buckingham St.
Springfield, MA 01109

s/Kerry Sue Healey — 19 Clinton Street
Ware, MA 01082

COMMONWEALTH OF MASSACHUSETTS
Hampshire, ss.

Before me, the undersigned authority, on this day personally appeared the testator and the witnesses whose names are signed to the attached or foregoing instrument, and, all of these persons being by me duly sworn, the testator declared to me and to the witnesses in my presence that the instrument is his last will and that he had willingly signed or directed another to sign for him, and that he executed it as his free and voluntary act for the purposes therein expressed; and each of the witnesses stated to me, in the presence of the testator, that she signed the will as [**p. 11] witness and that to the best of her knowledge the testator was eighteen years of age or over, of sound mind and under, no constraint or undue influence.

s/Gregory Gillespie

s/Karen Swenson

s/Kerry Sue Healey

Subscribed and sworn to before me by the said testator and the said witnesses, this 17th day of November, 1988.

s/William E. Hart
Notary Public

My commission expires: July 10, 1992

FIRST CODICIL TO LAST WILL AND TESTAMENT OF GREGORY GILLESPIE

I, GREGORY GILLESPIE, of Belchertown, Hampshire County, Massachusetts, declare this instrument to be the first codicil to my last will and testament, dated November 17, 1988.

1. I hereby amend said will by deleting the second sentence of the first paragraph of Article FIRST thereof and by deleting the phrase "with a separate order so determined for the second, third, fourth and fifth works of art to be chosen by my said children" from the second sentence of the third paragraph of said Article FIRST.

2. I hereby amend said will by deleting the name "PHYLLIS KORNFELD" from the second paragraph of Article THIRD and replacing such name with the name "VIRGINIA KAESER."

3. I hereby amend said will by deleting Article SEVENTH in its entirety and substituting the following in its place and stead:

"SEVENTH: I appoint my wife, PEGGY ROGGENBUCK GILLESPIE, as guardian of the person and property of my minor children. If my wife is unable or unwilling or ceases to serve as such guardian, I appoint my friend VIRGINIA KAESER, of Amherst, Massachusetts, as guardian of the person and property of any such children. If the said VIRGINIA KAESER shall be unwilling or unable or ceases to act as such guardian, her [**p. 2] husband, JAMES MARINISS, shall act as such guardian."

4. Save as amended hereby, I ratify, confirm and republish said will.

IN WITNESS WHEREOF, I have hereunto set my hand on this Feb 25, 1992.

s/Gregory Gillespie
Gregory Gillespie

Signed, published and declared by the Testator, GREGORY GILLESPIE as the first codicil to his last will and testament, dated November 17, 1988, in the presence of us, who in his presence, at his request and in the presence of each other, have hereto subscribed our names as witnesses, and it is the opinion of each of us that said Testator is of full age and of sound mind.

s/MaryAnn Grim — 65 Alpine Drive, Amherst, MA 01002

s/Donna Gingras — 132 Elm Street, Hatfield, MA 01038

COMMONWEALTH OF MASSACHUSETTS
Hampshire, ss.

Before me, the undersigned authority, on this day personally appeared the testator and the witnesses whose names are signed to the attached or foregoing instrument, and, all of these persons being by me duly sworn, the testator declared to me and to the witnesses in my presence that the instrument is the first codicil to his last will and that he had willingly signed or directed another to sign for him, and that he executed it as his free and voluntary act for the purposes therein expressed; and each of the witnesses stated to me, in the presence of the testator, that he or she signed the codicil as witness and that to the best of his or her knowledge the testator was eighteen years of age or over, of sound mind and under no constraint or undue influence.

s/Gregory Gillespie

s/MaryAnn Grim

s/Donna Gingras

Subscribed and sworn to before me by the said testator and the said witnesses, this 25th day of February, 1992.

s/William E. Hart
Notary Public
My commission expires: July 10, 1992

APPENDIX F

Letter from Adam Weinberg,
Director of the Whitney Museum, NYC
(A2-273)

WHITNEY

Adam D. Weinberg
Alice Pratt Brown
Director

Whitney Museum of American Art
945 Madison Avenue at 75th Street
New York, NY 10021
www.whitney.org
Tel. (212) 570-3635
Fax (212) 535-6186

October 31, 2003

Mr. Vincent Gillespie
P.O. Box 741
Northampton, MA 01061

Dear Vincent,

This letter is in response to your inquiry regarding the estate of your father Gregory Gillespie. As you know, the Whitney has the very best regard for Gregory's work. The Whitney, the Museum of record for 20th Century American art, has in its collection, 3 pieces of his work, which have been included in many group exhibitions since 1965.

I am, needless to say, very hesitant to enter any dispute regarding Gregory Gillespie's estate, but as per your request I can say that to my knowledge and to that of our Curator of Contemporary, Lawrence Rinder, his work has not been affected by his Estate for sale or as a donation to the Museum. We of course would be interested in acquiring a key work, especially if it were to be offered as a donation to the Museum. It is always of benefit for an artist of note to have his work accessible to scholars and the community in permanent collections.

I hope this information is what you are seeking.

Yours sincerely,

s/_____

APPENDIX G

Letter from Malcolm Rogers,
Director of the Museum Of Fine Arts, Boston
(A2-719)

Museum Of Fine Arts, Boston
465 Huntington Avenue
Boston, Massachusetts
mfa [logo] 02115-5519

Facsimile Cover Sheet

Date: 24 October 2003

Number of pages including cover sheet: 1

To: **Vincent Gillespie**
Fax: 413 585 5135

From: Malcolm Rogers -
Ann and Graham Gund Director
Department: Director's Office
Phone: 617-369-3161
Fax: 617-369-3064

Mr. Vincent Gillespie
PO Box 741
Northampton, MA 01061

Dear Vincent:

Thank you for your recent enquiry. I am writing to confirm that, to the best of my knowledge, the Museum of Fine Arts, Boston, has not been contacted by the trustees of your late father's estate in connection with the disposition of the paintings in the estate. We would like very much to hear from them.

As I am sure you know, your late father was a distinguished and well known artist, and it is

undoubtedly the case that, were works by him to enter public collections, they would be greatly appreciated, and that their display would be very much for the public benefit.

I can also confirm that, although the Museum of Fine Arts does already hold examples of your father's work, we would certainly like to add to the depth of our holdings, so that we can do full justice to the range of the work of this distinguished New England artist.

APPENDIX H

Excerpt of transcript from the
Forum Gallery vs. Peggy Gillespie, et al. case
(A1-273)

Excerpt of transcript from the
Forum Gallery vs. Peggy Gillespie, et al. lawsuit:

THE COURT: Let's focus on the time period after he died.

It just seems to me that the record is replete with acknowledgment and lack of dispute about the existing debt. I mean, if we start with Exhibit C to Ms. Gillespie's affidavit, we have a document prepared by the estate's counsel, which in paragraph 4 acknowledges that, "30 percent of the gross sales price of the decedent's works of art shall be paid to the gallery to reduce the decedent's arrearage in advances existing at his date of death, which at that time was $300,072.44."

That is in the language of the estate's own lawyer. No one put it in the lawyer's mouth.

You then go on. Turning to Mr. Fishko's affidavit, we have Exhibit 13, dated July 27, 2000. And I am not sure if that is accurately dated or not. I mean, I don't know if that's meant to be April 27th. In any event, it is apparently sent and recites the $300,000 balance due. It is not objected to. You don't claim anyplace that it was objected to.

We go on to Exhibit 14, which is the consignment agreement, which says that half of the 60 percent that the estate gets shall be used "to pay off the advanced balance to the Forum Gallery."

This again is a document prepared by Ms. Gillespie, not prepared by the Forum.

We then have Exhibit 15, which reflects the sending of a check in the amount of $32,400 on August 30, 2000, which is cashed and cashed in relationship to a document which says that the other 50 percent of the net proceeds are to be used to reduce the debt to Forum Gallery.

We then again on December 10th have a similar document, again not objected to, with the check again cashed.

I mean, it seems to me that there is a record here in which the estate has acknowledged time and time again, and without anyone holding a gun to their head, that this is a preexisting debt that they are obligated to pay.

MS. MATHER: Your Honor, I disagree with that, and I will try to tell you why.

Looking over those documents, there's only two of those documents that actually come from the estate that you mentioned –

THE COURT: You know the concept of acts stated, that when a document is sent to you, if you object to it you have an obligation to object and not to cash the check? Did you cash the check under protest? Did you reserve any rights when you took the money?

MS. MATHER: Well, your Honor, given all the other correspondence and all the other conversations that occurred between the parties, it certainly wouldn't seem in equity or good conscience that in fact the estate would be personally liable based on the fact that there is a portion of an account statement that says to reduce debt to Forum Gallery, including a check, that Ms. Gillespie at that time would have–

THE COURT: She was awarded throughout this entire period. This is not a situation in which you have an unrepresented grieving widow who because of an emotional situation was incapable of protecting herself. I mean, what you are suggesting, it is not a good overreaching argument here, I don't think.

(Emphasis added.)
(Forum Gallery vs. Peggy Gillespie, et al. transcript of 2/26/02 hearing, p. 17, line 15 through p. 19, line 23.)
(A1-273.)

APPENDIX I

M.G.L. chapter 230 § 5:

GENERAL LAWS OF MASSACHUSETTS

PART III.
COURTS, JUDICIAL OFFICERS, AND PROCEEDINGS IN CIVIL CASES

TITLE II.
ACTIONS AND PROCEEDINGS THEREIN

CHAPTER 230. ACTIONS BY AND AGAINST EXECUTORS AND ADMINISTRATORS

Chapter 230: Section 5. Refusal to enforce claim; action by heir, legatee or creditor

"Section 5. It shall be unnecessary to remove an executor or administrator in order that an action to enforce a claim in favor of the estate may be brought by an administrator to be appointed in his place, when he refuses to bring such action at the request of an heir, legatee or creditor, or is unable to do so by reason of his interest or otherwise, but an heir, legatee or creditor having an interest in the enforcement of any such claim may bring a civil action to enforce it for the benefit of the estate in like circumstances and in like manner as a person beneficially interested in a trust fund may bring an action to enforce a claim in favor of such fund, and in case of such action in respect to real estate, it shall not be an obstacle to the action that a license to sell it has not been obtained by the executor or administrator."

APPENDIX J

M.G.L. chapter 215 § 11:

GENERAL LAWS OF MASSACHUSETTS

PART III.
COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES

TITLE I.
COURTS AND JUDICIAL OFFICERS

CHAPTER 215. PROBATE COURTS

APPEALS

Chapter 215: Section 11. Report of facts

"Section 11. In cases not governed by the Massachusetts Rules of Civil Procedure or comparable rules for domestic relations matters, the judge by whom an order, judgment, decree or denial was made shall report the material facts found by him, on request of any party entitled to appeal therefrom made within ten days after such party has notice of such order, judgment, decree or denial; otherwise such report shall be in the discretion of the judge."

APPENDIX K

M.G.L. chapter 68 § 18:

PART I. ADMINISTRATION OF THE GOVERNMENT

TITLE XI. CERTAIN RELIGIOUS AND CHARITABLE MATTERS

CHAPTER 68. DONATIONS AND CONVEYANCES FOR PIOUS AND CHARITABLE USES

Chapter 68: Section 18. Definitions

"Section 18. When used in this section, and in sections nineteen to thirty-five, inclusive, the following terms shall have the following meanings:—

" 'Charitable', including but not limited to benevolent, educational, philanthropic, humane, patriotic, scientific, literary, religious, eleemosynary, health, safety or welfare-related, or in furtherance of governmental or civic objectives, and benefiting the general public or some indefinite class thereof;"

APPENDIX L

Massachusetts Constitution, Part 1, Article XI:

"Article XI. Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws."

APPENDIX M

U.S. Constitution, 14th Amendment (Section 1):

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. *No State shall* make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor *deny to any person within its jurisdiction the equal protection of the laws.*"

APPENDIX N

American Jurisprudence, second edition,
volume 15, section 118:

"**§ 118 Generally; charities as favorites of the law**

"Gifts or trusts for charitable purposes are favorites of the law and the courts. It is the fixed policy of the law to uphold charitable gifts and trusts whenever possible. That is, gifts or trusts, whether inter vivos or testamentary, for purposes which the law recognizes as charitable, are regarded with *special favor*, once the charitable purpose becomes evident, and will not be declared void if they can, by any possibility consistent with law, be upheld. **Courts of equity, it is said, will go to the length of their judicial power to sustain such gifts.** *Provisions for such gifts are construed so as to give them effect, if possible, and to carry out the general intention of the donor when clearly manifested, even if the particular form and manner pointed out by him cannot be followed.* When called upon to construe private humanitarianism, courts do not adopt an antagonistic spirit toward a donor's charitable intent, and **it is the rule that where doubt exists, a gift must be interpreted in favor of a charity.** Where they cannot be followed literally, the courts usually apply the cy pres or a similar doctrine. It is manifest from the above principles that gifts for charitable purposes are upheld under some circumstances where a private gift might fail."

(All emphasis except in the title line has been added.)

APPENDIX O

Massachusetts Rules Of Civil Procedure, Rule 60(b):

RULE 60.
RELIEF FROM JUDGMENT OR ORDER

"(b) Mistake; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. Writs of review, of error, of audita querela, and petitions to vacate judgment are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."